SUPREME COURT OF THE UNITED STATES.

October Term, 1943.

PETER W. BURNS,
Petitioner,
versus
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

The opinion rendered by the United States Circuit Court of Appeals for the Second Circuit is set forth in the appendix hereto. No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction.

The statutory provisions under which the jurisdiction of this Court is invoked is Section 240 (2) of the Judicial Code, as amended by Act of February 13th, 1925, and the Act of March 8th, 1934.

ARGUMENT.

POINT I.

The defendant petitioner Peter W. Burns did not have a fair and impartial jury guaranteed him by law.

The defense of the said Peter W. Burns was that he was not connected with Chester G. Bollenbach who had been

identified or who was thereafter identified as being in Minneapolis in the Court House where the stolen securities were. The said Chester G. Bollenbach addressed the jury connecting himself directly with the said Peter W. Burns by denouncing the District Attorney who was trying the case and the Federal Investigator who was in charge of the prosecution accusing them of attempting to influence a woman friend of the petitioner Peter W. Burns.

This voluntary defense by the said Chester G. Bollenbach of Peter W. Burns directly connected the petitioner with the said Chester G. Bollenbach who was thereafter identified as the person who had been in the room where the stolen securities were in Minneapolis, yet the said jury was allowed to continue in the case over the objection of the petitioner Peter W. Burns, after having listened to the said Chester G. Bollenbach's vigorous denunciation of the Government, in defense of the petitioner. Thereafter it was impossible for the said jury to fairly and impartially weigh the evidence. And by reason of this conduct by Chester G. Bollenbach in the presence of the jury, the petitioner Peter W. Burns was deprived of a fair and impartial jury. Galloway v. United States, Advanced Opinions 1943, No. 16, page 1042.

It is respectfully urged that the trial Judge of his own motion should have discharged the jury on the objection of said Peter W. Burns to going to trial before this jury after he was denied a severance from Chester G. Bollenbach and the other defendants. As to separate trials, see: Opinion reported in 7 C.C.A. United States v. Matt Hopt, decided June 30, 1943, in a treason trial in which the Appellate Court held that it was error not to grant a severance. See: Fed. Supp. Vol. 47, No. 11, page 937; "The Supreme

Court has admonished us that, 'The State, whose interes
it is the duty of Court and Counsel alike to uphold, is con
cerned that every litigation be fairly and impartially con
ducted and that verdicts of juries be rendered only on th
issues made by the pleadings and the evidence. The pub
lic interest requires that the Court of its own motion, a
is its power and duty, protect suitors in their right to
verdict, uninfluenced by the appeals of counsel to passio
er prejudice.' New York Central R. Co. v. Johnso
1928, 279 U. S. 310, 49 S. Ct. 300, 303, 73 L. Ed. 706. Se
also, Price v. Mullen, 1936, 247 App. Div. 532, 228 N. Y. S
828; Cherry Creek National Bank v. Fidelity & Casualt
Co. of New York, 1924, 207 App. Div. 787, 202 N. Y. S. 61
Bagully v. Morning Journal Association, 1899, 38 App
Div. 522, 56 N. Y. S. 605; Zemliansky v. United Parc
Service, Inc. 1940, 175 Misc. 829, 24 N. Y. S. 2d 672, an
cases there cited.'' United States v. Certain Lands, etc., 4
F. Supp. 934.

Right to a severance is a valid right although ordinaril
in the discretion of the Court. If the same is not grante
the Appellate Court will consider the exercise of the di
cretion of the trial Court.

As to prejudice or manner in the conduct of a trial, th
Supreme Court of Michigan in the case of Secrist v. Cit
of Detroit, 299 Mich. 393; 300 Northwestern 137, held tha
there was no hard and fast rule, but the principle was ge
eral, as to a jury trial it must be held in an atmosphe
of judicial calm, so says American Jurisprudence, Vo
14, page 853, section 130; the right to a jury trial is san
as known at law and cannot be taken away; America
Jurisprudence, Vol. 31, page 585, section 36, and case
cited.

U. S. v. Glasser, 86 Advanced Sheets, U. S. Su
Ct. page 406, headnote 22.

POINT II.

Testimony was admitted over the objection of Peter W. Burns showing the alleged commission of a series of crimes alleged by the defendant Turley.

These crimes were of different nature but mainly had to do with the reception and disposal of stolen goods. With these crimes the petitioner Peter W. Burns had nothing to do. And it is respectfully submitted that although there is authority for the admission of testimony of other crimes of a like nature as against a defendant on trial, yet there is a reasonable limit as to the admission of such testimony and certainly there is no warrant in law for admitting the testimony as to crimes not committed or connected with the petitioner Peter W. Burns. (fols. 1367-1406.)

The following cases are authority for the admission of testimony of similar crimes yet they are not authority for the admission of such testimony as to a joint defendant unconnected with the commission of the alleged crimes.

And it is respectfully submitted that the admission of such testimony was error for the jury. See following cases:

As to the admission of crimes other than the one charged in the indictment; see Bishop's Criminal Procedure second Edition, paragraph 1120-1129; paragraph 1124 is as follows: "Even where offenses are of a like sort, evidence to one is not ordinarily admissal in proof of another, as for a trial in larceny, to show that the defendant committed other and disconnected larceny; or, for riot, that he has been engaged in other riots; or for the murder of par-

ticular persons, that at another time and place he murdered or threatened another person; or, for burglary in one County, than he committed the like in another. Hence *A fortiori* distinct crimes of other sorts than the one on trial are inadmissable.'' Note 79 at bottom of page.

In the case under discussion the evidence objected to is practically that of receiving stolen goods by a defendant other than Peter W. Burns, petitioner, which testimony was given by convicts. Such testimony did not prove even that the joint defendant against whom such evidence was given, was guilty of transporting stolen securities in Interstate Commerce. Also in this connection, see: Jones v. People, 44, Colorado 535; 16 Annotated cases 787; McCormick v. United States, 9 Fed. 2d 237, as to what kind of similar crimes can be proved and the effect thereof. (fols. 2482-2483.)

It is also urged that the evidence when admitted, was incorrectly characterized as to effect by His Honor, the trial Judge. Also General Digest, Criminal Law, subtitle 673, (5) collects cases as to other crimes that can and cannot be proved.

POINT III.

The evidence was wholly insufficient to establish the commission of the crime alleged in the indictment, and the verdict of the Jury and the decision of the Circuit Court of Appeals were predicated solely upon inference, guess, conjecture and surmise.

Under the first count of the indictment petitioner is charged with transporting or knowingly causing stolen

bonds to be transported in interstate commerce. The proof, however, wholly failed to establish that petitioner either transported or caused the transportation of such bonds or even knew of their existence.

Despite the length of the record, the proof with reference to the indictment itself is very brief. In April, 1937, the Clerk of the United States District Court in Minneapolis discovered that certain bonds were missing from the files, which bonds had previously been seen in January, 1935. There was no evidence that the bonds were in the files during the intervening period. In January, 1937, it is claimed a man, who was later identified as Bollenbach, made an examination of the files in which the bonds were supposedly contained.

Insofar as petitioner is concerned, the only proof in the record is that in January, 1937, he was in Minneapolis and that he returned to New York some time in February, 1937; that he had been away from New York for some two and a half months, and that during his absence, while in Chicago, he made a telephone call to defendant, TURLEY, which he claimed was in connection with some stockholders' lists.

There is no proof that petitioner examined the files where the bonds were supposedly contained; that he knew BOLLENBACH was in Minneapolis, or had examined the files; that he saw BOLLENBACH while in Minneapolis; that he knew that any bonds were contained in the file, or that they had been taken therefrom. There was likewise no proof that he had ever discussed the bonds in question with either BOLLENBACH, TURLEY, or any other defendant, or that he did anything in connection with such bonds.

Despite this thin proof the jury was permitted to indulge in guess, conjecture, speculation and inference in

order to arrive at a verdict. The Circuit Court of Appeals in its decision, likewise, indulged in inference and speculation, and reading of the opinion in that Court will disclose that inferences were the sole basis of the judgment of conviction and the decision of the Circuit Court of Appeals. That has never been the law.

It has been held on numerous occasions that in order to justify a conviction on circumstantial evidence, it is necessary that the directly proven circumstances be such as to exclude every hypothesis but that of guilt. *United States vs. Russo,* 123 F. 2nd 420 (3 C. C. A.).

In *Rosenberg vs. United States,* 120 F. 2nd 935, the Tenth Circuit Court of Appeals held:

> "* * * But an inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt. *United States v. Ross,* 92 U. S. 281, 23 L. Ed. 707; *Vernon v. United States,* 8 Circ. 1146 F. 121; *Brady v. United States, supra,* (24 F. 2d 399); *Mackett v. United States, supra,* (90 F. 2d 462)."

The Court of Appeals of the State of New York in *People vs. Weiss,* 209 N. Y. 160, stated the law to be:

> "* * * The prosecution relied upon circumstantial evidence to establish both those facts. In such circumstances, the facts from which the inferences are to be drawn must be established by direct proof; the inferences may not be based upon conjecture, supposition, suggestion, speculation or upon other inferences; the conclusion sought must flow naturally from the proven facts and be consistent with them all; the proven facts must exclude to a moral certainty every hypothesis except that of guilt or of the offense charged, and not alone must all the proven facts be consistent with and

point to guilt, but they must be inconsistent with innocence (People, &c., v. Fitzgerald, 156 N. Y. 253; People, &c., v. Razezics, 206 N. Y. 249; People, &c., v. Woltering, 275 N. Y. 51). They are of no value if consistent with either the hypothesis of innocence or the hypothesis of guilt. It is not enough if the hypothesis of guilt will account for all the facts proven." (People v. Suffern, 267 N. Y. 115, 127.)"

The proof in the case is wholly insufficient to prove as a matter of law beyond a reasonable doubt that petitioner had anything to do with either the theft or transportation of the bonds. The record is further barren of any proof as to who actually stole the bonds and transported them to New York, although, by inference, the Government sought to establish that BOLLENBACH took them from the files in Minneapolis.* In any event no claim was ever made that petitioner took the bonds.

The facts adduced as to petitioner are, we submit, as consistent with innocence as with guilt and cannot form the basis of a conviction. Before any conviction may be had, Section 415 of Title 18 of the United States Code, some criminal act by petitioner in connection with the transportation of the securities must be proven. This the government failed to do.

In McAdams vs. United States, 74 Fed. 2d 37, the defendant was charged with a violation of Section 408 of Title 18, United States Code. Although relating to motor vehicles, it is similar to the statute herein involved. The Court there held:

"The Government offered no evidence to show who stole the cars, who transported them, when they arrived in Arkansas, or through whose hands they passed before they reached the defendant * * *."

In the case of *Wolf vs. United States,* 36 Fed. (2nd) 450, the Court stated:

> "In the instant case, there is not a scintilla of evidence to suggest that either defendant stole the car or that either defendant knew of the car's existence until it was in Indianapolis."

Before a judgment of conviction can be sustained, it must be established beyond a reasonable doubt that the petitioner either transported the stolen bonds or, knowingly, caused them to be transported in interstate commerce. No such proof was here presented. Instead, inference, guess and conjecture were indulged in to arrive at the conclusion that merely because petitioner may have been in Minneapolis about the time the Government claimed the bonds might have been stolen that he had some connection with their transportation. This, we submit, is not due process of law.

POINT IV.

The Government wholly failed to establish that petitioner engaged or participated in any conspiracy to transport stolen bonds in interstate commerce.

Under the Second count of the indictment three overt acts are alleged for the purpose of establishing a conspiracy to transport stolen securities in interstate commerce. No proof was offered to connect petitioner with either the first or second overt acts. The third overt act alleged that petitioner attended at the office of defendant, TURLEY, on or about February 11th, 1935, and there had a conversation with certain other defendants.

Even if the testimony with reference to this third overt act be believed, it would be insufficient to establish the

participation by petitioner in any conspiracy as charged. The record establishes beyond doubt that the bonds in question must have been in New York on the 3rd day of February, 1937, at which time ten were delivered to Hart Smith & Company for sale, and a check therefor delivered to Arnold Berendson. The remaining 15 bonds were delivered to Ingalls and Blaser for sale no later than February 5th, 1937, so that any conspiracy to transport bonds in interstate commerce that may have existed must necessarily have come to an end no later than February 5th, 1937.

The record is likewise devoid of any evidence that petitioner had any knowledge of the existence of any conspiracy to transport stolen securities in interstate commerce. Even if it be assumed that the testimony with reference to a meeting on February 11th be truthful and that petitioner then learned of such a scheme, there would still be no evidence that petitioner engaged or participated in any conspiracy or knew of the existence thereof.

This Court in *United States vs. Falcone*, 311 U. S. 205, 210, said:

> "And they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy.
>
> "The gist of the offense of conspiracy as defined by Sec. 37 of the Criminal Code, 18 U. S. C. Sec. 88 is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. Pettibone v. United States, 148 U. S. 197; Marino v. United States, *supra* (91 Fed. (2d) 691; Troutman v. United States, 100 F. (2) 628; Beland v. United States, 100 F. (2d) 289; of Gebardi v. United States, *supra* (287 U. S. 112-121). Those having no knowledge of the

> conspiracy are not conspirators, United States v. Hirsch, 100 U. S. 33, 34; * * * and one who without more furnished supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge."

It is urged that there is nothing in the record to show that petitioner in any way participated in the crime of transportation, as alleged in the indictment, or that he was a party to, connived in, or had any knowledge of either the transportation of the securities or of the persons who did the transporting, or that he took any part in any of the arrangements for the transportation of such securities, or that he in any manner, knowingly, caused the transportation.

The Second Circuit Court in *Gable vs. United States,* 84 Fed. 2nd, 929, a case where the proof was much stronger than here presented, held:

> "Nor is there any proof of conspiracy upon the part of appellant to transport in interstate commerce stolen property. The record is devoid of any evidence that appellant had any understanding or agreement, tacit or otherwise, looking toward the stealing of the bonds, transportation of the same, or delivery of the same after transportation. The only proof is that after the bonds had been stolen and transported and delivered to him, he agreed, for a commission, to dispose of the same. This is not proof of the conspiracy charged. With what his guilty may be under the statute of Illinois governing criminal offenses, we are not concerned. There being no evidence of a commission of a federal crime, the judgment is reversed."

In *DeLuca vs. United States,* 299 Fed. 741, in the Circuit Court of Appeals, Second Circuit, the Court said:

"* * * The overt act must be one which tends to further the conspiracy. If not, it is not an overt act, no matter what it may be called. It is the character of the act which is the determining factor and classifies it. It is not the same which it may be called. The object of the conspiracy charged was obtained as soon as the opium was out of the bonded warehouse. It was then that the government's lien on the opium was gone. It had been defrauded, and the conspiracy was ended. No act can further the conspiracy which transpires after the end of the conspiracy. Feder vs. United States, 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370; Lonabaugh vs. United States, 179 Fed. 476, 103 C. C. A. 56.

"This overt act of sale, as alleged and as pleaded in the indictment, was not in furtherance of the conspiracy to defraud the customs duties. * * *"

The authorities agree that anything moving in interstate commerce loses its interstate character when it crosses State lines and comes to rest in the State where it was shipped or transported. A conspiracy, therefore, to violate 18 U. S. C. Section 415 could not even include a sale as an overt act, any more than it could include discovery, gift or other disposition of the securities after the transportation was completed.

In Susquehanna Coal Co. vs. Mayor, etc., 184 Fed. 941, the Court said:

"Assuming, but not deciding, that the coal in question, before it was dumped into the storage yard at South Amboy, was 'Interstate Commerce.' I am satisfied that under the authorities, in the circumstances, and the purposes of its subsequent storage at South Amboy, it lost its character as 'interstate commerce', and became a part of the general mass of the property in New Jersey subject to taxation. The coal in storage was the property of the complainant. It had not been sold or set aside to any purchaser. It was there not because the carriage to any particular consignee had been interrupted by any of a number of causes that

> may occur in transportation, but because it had reached its destination—not the ultimate, but the intermediate destination. It had been consigned to South Amboy to the shipper's own order, and its storage was for the benefit of the shipper, and not the carrier. It was undoubtedly intended to go further, but not on that carriage. It was there at rest, no longer in transit, and could, at the will of the shipper, be forwarded to any point within as well as without the state. * * *"

United States v. McGuire, Circuit Court of Appeals New York, 64 F. (2d) 485 involved the transportation in interstate commerce of lottery tickets in violation of 18 U. S. C. A. 387, forbidding the transportation in interstate commerce of lottery tickets. The tickets were printed at Scranton, Pa. They were shipped, when printed, to Philadelphia, where they were placed in packages and shipped by express to various states. The particular tickets discussed were shipped to one Finn at Middletown, New York,

> "After the tickets, though they had been sent from Pennsylvania to New York, were received from the interstate carriage in New York, they were no longer in interstate commerce. Sonneborn Bros. v. Cureton, 262 U. S. 507, 43 S. Ct. 643."

It is respectfully submitted that the proof wholly failed to establish that petitioner engaged or participated in any conspiracy, that he committed any overt act in furtherance thereof, or that he had any intent whatsoever to engage in any such conspiracy.

POINT V.

The Court's Charge to the Jury was so prejudicial as to deprive petitioner of a fair and impartial trial and to deprive him of his constitutional right to a trial according to due process of law.

The Trial Court, in charging the jury on the question of conspiracy, advised them that they might take into consideration circumstances which were wholly unsupported by any evidence and based upon such circumstances, find the defendants guilty. This was so prejudicial and detrimental as to deprive him of a fair and impartial trial. The portion of the Judge's charge referred to is set forth in the petition, and for that reason is not here reported.

This Court in *Quercia v. United States,* 289 U. S. 466, held:

> "The judge may not however, usurp the functions of the jury; and if his instructions may fairly be said to have been coercive upon the jurors in their consideration of facts determinative of their conclusions upon the question of guilt, the charge is erroneous even though in form it is an expression of the Court's opinion and the jurors are told that, after all they are to determine the facts. This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled but judicial to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of witness. He may analyze and dissect the evidence but he may neither distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. *The influence of the trial judge on the jury 'is necessarily and properly of great weight and his lightest word or intimation is*

> *received with deference, and may prove controlling.'* This Court has accordingly emphasized the duty of the trial judge to use great care than an expression of opinion upon evidence 'should be so given as not to mislead, and especially that it should not be one-sided' *that deductions and theories not warranted by the evidence should be studiously avoided. Starr v. United States,* 153 U. S. 614, 626; *Hichong v. United States,* 160 U. S. 408, 421-423. *He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered. United States v. Breitling,* 20 How. 252, 254, 255.''

We submit that a fair and impartial trial was denied petitioner, and that by reason of the inflammatory and prejudicial charge to the jury, coupled with the fact that they were permitted to indulge in conjecture, inference and surmise in arriving at a verdict, that due process of law was denied to petitioner.

POINT VI.

The Trial Court committed reversible error in permitting testimony of the defendant, Jacobson before the Grand Jury to be read into evidence.

Despite the fact that every accused is guaranteed the right of being confronted with the witnesses against him under the Sixth amendment of the Constitution, petitioner was denied this right and likewise the right to cross examine, by reason of the fact that there was read into evidence the testimony given by the defendant, JACOBSON, before the Grand Jury.

Despite the fact that the Trial Court admitted such testimony only as against JACOBSON, it contained prejudicial statements against petitioner, concerning which he had no opportunity to cross examine. Timely objection

was made. (fols. 937, 938.) This testimony, despite the fact that it was admitted only as against JACOBSON, could not help but prejudice the rights of petitioner.

Although petitioner was not required to explore the minds of the jurors in an effort to prove that it did influence their verdict, (United States vs. Dressler, 112 Fed. 2d. 972; Coulston vs. United States, 51 Fed. 2nd, 189) we submit that the jury was affected by it, and that in reaching its verdict it, undoubtedly, took such testimony into consideration.

We further submit that even the Circuit Court in reaching its decision took into consideration as against petitioner evidence which had been admitted only as against TURLEY, when it referred to testimony that TURLEY had told Blaser and Ingalls in April, 1937, that BURNS had stolen the bonds. This in spite of the fact that there was no evidence or contention that petitioner took the bonds from the Courthouse.

We submit that petitioner was here denied a fair and impartial trial according to due process of law and that he was convicted as a result of accumulation of prejudicial errors and by reason of the fact that inferences, guess and conjecture were indulged in, rather than upon legal evidence, and that he was denied the right to cross examine witnesses against him and of being confronted with such witnesses; and that there was no legal evidence whatsoever to support the judgment of conviction.

Conclusion.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Petitioner.